personal jurisdiction. *Omni Capital,* 484 U.S. at 102-04. The Court did not in any way reject the importance of federalism concerns in personal jurisdiction cases. Indeed, the language Respondent quotes from *Omni Capital* is itself a quote from *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), in which the Court explicitly recognized the fact that "the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States." *Id.* at 703 n.10.

The problem with Respondent's argument is that it only focuses on one side of the lawsuit. It is true, as Respondent states, that "each state has an interest in protecting the rights of its citizens." Opp. Br. at 16. And certainly one of those rights is to seek redress for injury. But another equally important right is not to be haled into court in a foreign state where the citizen of the first state has not transacted business or otherwise consented to jurisdiction. Thus, in a long line of cases beginning with *Pennoyer* v. *Neff,* 95 U.S. 714 (1878) and continuing through *Int'l. Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen*, 444 U.S. 286, the Court has sought to balance the rights of the citizens of the first state to seek redress while also protecting the rights of the citizens of the second state from being haled into a state in which they have not consented to jurisdiction. Respondent's brief, like the "steam of commerce" test itself, largely ignores the rights of the citizens of the second state. Instead, it makes the rights of the citizens of the first state paramount over the rights of citizens of other states. *See* Opp. Br. at 17.

Such a one-sided weighing of rights violates the Constitution. The rights of each state's citizens must be respected, as the Court explained in *World-Wide Volkswagen*:

> [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, ***implied a limitation on the sovereignty of all of its sister States*** -- a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment. . . . [Thus,] the Due Process Clause, ***acting as an instrument of interstate federalism***, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. 293-294 (emphasis added).

As explained in the petition, only the "stream of commerce plus" test complies with federalism because by requiring the defendant to take an action purposefully directed toward the forum state, it respects the unique jurisdiction of each state. Accordingly, the Court should grant the petition because as Judge DeMoss accurately stated, "the sovereignty of the individual states is on the line." Pet. Br. at App. 18.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for *certiorari* should be granted.

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Supreme Court, U.S.
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No. 05-1232

IN THE
Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY

Petitioners

v.

LUV N' CARE, LTD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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On June 26, 2006, the Court denied Insta-Mix's petition for certiorari. Due to two intervening cases, Insta-Mix respectfully requests the Court to reconsider its order and grant the petition for *certiorari*.

In its petition for *certiorari*, Insta-Mix[1] demonstrated that there is a growing split between the circuits and states that use the "stream of commerce" test first mentioned in *dicta* in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and the circuits and states that use the "stream of commerce plus" test stated in Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

In its opposition,[2] while conceding that there is a split in the circuits, Respondent contended that the split in the circuits might "eventual[ly] evaporat[e]." Opp. Br. at 12. Two cases that were decided after the final briefing on the certiorari petition demonstrate that Respondent is wrong; rather than "evaporating," the split is growing, and the confusion in the lower courts is compounding. Indeed, one of these cases was explicitly decided under the "Wal-Mart exception" that Judge DeMoss presciently described in his concurring opinion below, in which he asked the Court to grant *certiorari*. *See* Pet. Br. at App. 17. Consequently, based on these two new cases, Petitioner respectfully requests the Court to reconsider its order and grant the petition for *certiorari*.

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[1] Petitioner Insta-Mix, Inc. ("Insta-Mix") does business or has done business in the other names in the style of the Petition (Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby).

[2] On May 1, 2006, the Court requested a response from the respondent.

Kernius v. Int'l Electronics, Inc., 2006 U.S. Dist. LEXIS 41158 (D. Md. June 6, 2006),[3] is a patent infringement suit where a defendant had moved to dismiss for lack of personal jurisdiction. In particular, one of the defendants claimed the lower court lacked jurisdiction because the defendant only sold its products to national retailers, such as Wal-Mart, who sold the products within the jurisdiction.

The district court noted that while the Fourth Circuit uses the "stream of commerce plus" test, the Federal Circuit has refused to decide whether to use "stream of commerce" or "stream of commerce plus." *Id.* at *11-12, n.2. The district court then found jurisdiction using the "stream of commerce" test[4] based solely on the fact that the defendant placed its articles into the stream of commerce by selling to Wal-Mart and other national retailers.[5] *Id.* at *14-15. The district court then went on to demonstrate the disarray that exists in the lower courts by stating that *Asahi's* "stream of commerce plus" test is also met by "the undisputed facts . . . that [the defendant's] devices are placed in the stream of commerce through established distribution channels." *Id.* at *12 n.2. But placing devices into the "stream of commerce [by] established distribution channels" does ***not*** meet the

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[3] The Reply Brief for the Petitioner was printed in the morning on June 6, 2006, and filed in the early afternoon. *Kernius* was not available in any electronic data base until some time after its filing date of June 6, 2006.

[4] Consequently, if *Kernius* was not a patent case and was appealable to the Fourth Circuit rather than the Federal Circuit, the lower court should have used the "stream of commerce plus" test rather than the "stream of commerce" test.

[5] *Kermius* demonstrates the prescience of Judge DeMoss' concurrence that the "stream of commerce" test violates due process by carving out a "Wal-Mart exception" for national jurisdiction. *See* Pet. Br. at App. 17.

"stream of commerce plus" test; rather, that action, by definition, only meets the "stream of commerce" test.

The confusion in the lower courts is further shown by *Burman v. Phoenix Worldwide Indus., Inc.*, 2006 U.S. Dist. LEXIS 46070 (D.D.C. July 7, 2006). In *Burman*, the district court began its analysis using the "***stream of commerce***" test. *Id.* at *13, n.4. But then it found "the stream of commerce doctrine inapplicable" based on the ***"stream of commerce plus"*** test because, *inter alia*, the plaintiff had failed to show "***additional conduct***" by the defendant that "indicates an intent or purpose to serve the market in the forum state." *Id.* (emphasis added) (*quoting* Justice O'Connor's *Asahi's* plurality opinion at 480 U.S. 112). Such additional conduct is only required under the "stream of commerce plus" test, not the "stream of commerce" test.

Thus, in *Kernius*, the lower court found the "***stream of commerce plus***" test met ***where the defendant engaged in no additional conduct*** beyond placing an article into the stream of commerce. Conversely, in *Burman*, the lower court found the "***stream of commerce***" test not met, based on the defendant's ***lack of "additional conduct."*** Both of these cases were decided incorrectly based on the standards the courts were using, and demonstrate the correctness of Judge DeMoss' statement that the test for personal jurisdiction is "in a state of complete disarray." Pet. Br. at App. 16. The Court should grant the petition for *certiorari* to eliminate the disarray and confusion in the lower courts regarding the "stream of commerce" and "stream of commerce plus" tests for personal jurisdiction.

For the foregoing reasons, and those stated in the petition and the reply brief of the petitioners, the Court should grant the petition for rehearing and grant the petition for *certiorari*.

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July 21, 2006

STATEMENT PURSUANT TO RULE 44(2)

I, Robert C. Nissen, hereby certify that the attached Petition for Rehearing is restricted to the grounds listed in Rule 44(2) and that it is presented in good faith and not for purposes of delay.

July 20, 2006

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